Supreme Court, U.S.
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No. 98-1836

IN THE

Supreme Court of the United States

UNITED STATES HEALTHCARE SYSTEMS OF PENNSYLVANIA, INC.,

Petitioner,

v.

PENNSYLVANIA HOSPITAL INSURANCE CO. AND THE COMMONWEALTH OF PENNSYLVANIA MEDICAL PROFESSIONAL LIABILITY CATASTROPHE LOSS FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether your Honorable Court has jurisdiction to review the decision of the Pennsylvania Supreme Court, which affirmed the order of the Pennsylvania Superior Court reversing the trial court's judgment and remanding for further proceedings on the merits of the claim?

In enacting ERISA, 29 U.S.C. § 1001, *et seq.* (1990), did Congress intend to supplant the states' traditional roles of regulating health care and enforcing common law tort rights, such that claims that a health maintenance organization was negligent in providing and arranging for medical care are preempted by § 514(a) of the statute?

STATEMENT PURSUANT TO RULES 14.1(b) AND 29.6

The petition accurately lists the parties to the proceedings.

Pennsylvania Hospital Insurance Corporation ("PHICO") is a subsidiary of PHICO Group, Inc., which is owned in its entirety by the Health Alliance of Pennsylvania.

The Commonwealth of Pennsylvania Medical Professional Liability Catastrophe Loss Fund ("CAT Fund") is a statutorily created executive agency of the Commonwealth.

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STATEMENT OF JURISDICTION

Petitioners have invoked the jurisdiction of your Honorable Court pursuant to 28 U.S.C. § 1257.

Respondents respectfully suggest that the jurisdiction provided to your Honorable Court under Article III of the Constitution and 28 U.S.C. § 1257 does not obtain in this case. The effect of the order of the Pennsylvania Supreme Court affirming the order of the Superior Court of Pennsylvania is the remand of the cause to the trial court for further proceedings on the merits of the claim. The decision of the Pennsylvania Supreme Court is, therefore, not final and not within the scope of your Honorable Court's jurisdiction.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

The opinion of the Pennsylvania Supreme Court accurately sets forth the factual background.

B. Procedural History

Plaintiffs below, Basile and Theodora Pappas, filed a complaint against David Asbel, D.O. and Haverford Community Hospital ("Haverford"), alleging, *inter alia*, that these defendants were negligent in failing to timely diagnose and treat Mr. Pappas' spinal cord compression. App. 47a-58a. Haverford filed an Original Joinder Complaint, joining United States Healthcare Systems of Pennsylvania, Inc. ("U.S. Healthcare") as an additional defendant. App. 59a-61a. Haverford alleged that "HMO-PA refused to authorize

transfer of husband/plaintiff to a hospital selected by physicians at Haverford Community Hospital" App. 60a, para. 7. Furthermore, by incorporation of paragraph 24 of plaintiffs' complaint (App. 60a, para. 6), Haverford alleged that HMO-PA negligently:

> a. fail[ed] to transfer the patient to a hospital capable and competent of administering to his acute medical condition in a prompt and timely fashion;
>
> b. delay[ed] inordinately in transferring the patient, keeping him at the Haverford Community Hospital during which time his spinal cord compression continued with resultant damage to the patient's spinal cord. App. 54a-55a.

At the close of discovery, U.S. Healthcare filed a Motion for Summary Judgment, claiming that Haverford's Joinder Complaint must be dismissed under the preemption provisions of the Federal Employee Retirement Income Security Act of 1975 (ERISA), 29 U.S.C. § 1001, *et seq.* (1990). The trial court granted U.S. Healthcare's Motion for Summary Judgment, finding that all of Haverford's claims against U.S. Healthcare fell within the confines of administration of an employee benefit plan, and therefore, were barred under the ERISA preemption provision. App. 41a. Ultimately, a settlement agreement was reached among the original parties, and the Pennsylvania Hospital Insurance Company ("PHICO") and the Commonwealth of Pennsylvania Medical Professional Liability Catastrophe Loss Fund ("CAT Fund") were substituted for Haverford as the real parties in interest. App. 45a-46a.

Upon appeal, the Superior Court of Pennsylvania reversed the trial court's decision, finding that Haverford's claims against U.S. Healthcare were state law negligence claims, and thus had no impact on the benefit plan in question. *Pappas v. Asbel*, 675 A.2d 711, 717 (Pa. Super. 1996); App. 18a-33a. In reaching that decision, the court was guided by *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). The court remanded the matter to the trial court for further proceedings on the merits of the claim.

The Pennsylvania Supreme Court considered this case for more than one and one half years before affirming the order of the Superior Court. *Pappas v. Asbel*, 724 A.2d 889 (Pa. 1998); App. 1a-16a. The court's decision to affirm the judgment of the Superior Court rendered in favor of PHICO and the CAT Fund was unanimous in its result. The decision of the court addresses and resolves the question whether claims of medical negligence are preempted by ERISA. In resolving that question, the court's opinion recognizes that your Honorable Court has yet to address directly the issue whether particular medical malpractice claims against an HMO "relate to" an ERISA plan. App. 6a. The Pennsylvania Supreme Court quite properly followed the direction of your Court in *Travelers, Id.*, as well as *California Div. of Labor Standards Enforcement v. Dillingham*, 519 U.S. 316 (1997) and most recently, *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997). The Pennsylvania Supreme Court also remanded the case for further proceedings on the merits of the claim and noted that the threshold issue of liability had yet to be resolved.

REASONS FOR DENYING THE WRIT

I.

YOUR HONORABLE COURT DOES NOT HAVE JURISDICTION TO REVIEW THIS CASE: THE ORDER PRESENTED BY PETITIONER IS NOT A FINAL ORDER.

The power of your Honorable Court to review the decisions rendered by state courts is limited to "final judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 U.S.C. § 1257(a). The consequence of the Pennsylvania Supreme Court's decision is remand of the cause for further proceedings on respondents' state law claims. The outcome of those proceedings could moot the question your Court is being petitioned to decide.

The Pennsylvania Supreme Court did not render a "final judgment". It affirmed the order of the Superior Court of Pennsylvania, which reversed and remanded for further proceedings the judgment of the trial court. App. 13a; 18a-19a. Indeed, the order itself contemplates further proceedings: "it is now left for the fact finder to determine if U.S. Healthcare's defenses to the negligence claims are valid." App. 13a, n.7.

Your Court has expressly recognized that the finality requirement "is not one of those technicalities to be easily scorned." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In order to be final and reviewable, a state court decision "must be subject to no further review or correction in any other State tribunal; it must also be final

as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Rail Co. v. Railroad Comm'n.*, 324 U.S. 548, 551 (1945). The decision below, remanding the cause for trial on all counts, plainly does not meet this standard. As your Court has observed under similar circumstances, "absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state law claims." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). Here, as in *Tarrant*, the outcome of the proceedings on remand could moot the federal question presently at issue. And, as in *Tarrant*, if the federal question does not become moot, petitioner will be free to seek your Court's review at the end of the state court proceedings. *See* 522 U.S. at 77-78.

Seeking to obtain your Court's jurisdiction, petitioner invokes *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975). Therein, your Court describes situations in which it has treated the decision of a state court on a federal issue as a final judgment. One of those instances which arguably may apply here, is when a petitioner "might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* Importantly, however, this exception applies when "a refusal immediately to review the state court decision might seriously erode federal policy". *Id.* That is not the case here. As pointed out more fully, *infra*, the decision of the Pennsylvania Supreme Court is in accordance with your Court's decisions, and thus consistent with federal policy.

II.

THERE IS NO CONFLICT WITH YOUR COURT'S DECISIONS CONSTRUING SECTION 514(a) OF ERISA.

Your Honorable Court has yet to confront squarely the issue whether medical negligence claims against an HMO are preempted by § 514(a) of ERISA. Recognizing this, the Pennsylvania Supreme Court correctly followed the direction prescribed by your Court in *Travelers, Dillingham*, and the more recent *DeBuono*. Contrary to U.S. Healthcare's assertion, the court below did not "anticipate" the overruling of precedent, but instead, applied your Court's endorsement to look to the "objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." App. 8a, citing *Travelers*. Importantly, this is the explicit directive your Court issued in *DeBuono*, 520 U.S. at 813-814.

U.S. Healthcare attempts to assign error to the Pennsylvania Supreme Court's reference, in its opinion, to Mr. Justice Scalia's concurrence in *Dillingham*. In doing so, however, U.S. Healthcare ignores the court's reliance on the *DeBuono* decision, in which the majority quotes from that same concurrence. *DeBuono*, 520 U.S. at 813, n.7.

The core of petitioner's argument in the courts below, as well as to your Court, is that Haverford's claim against it "arises from and directly relates to" the administration of benefits under an ERISA governed health plan, thus falling within the preemptive reach of § 514(a). Petition at 7. This argument falls short; by incorporating paragraph 24 of the plaintiffs' complaint, Haverford asserted that U.S.

Healthcare failed to transfer the patient to a hospital capable of treating his acute condition promptly and delayed in transferring the patient, thus increasing the injury to the patient. These allegations are common law tort allegations regarding the quality of the medical care provided. The institutions authorized by U.S. Healthcare to accept Mr. Pappas were not capable of accepting him with the speed necessary to treat his rapidly deteriorating condition, and U.S. Healthcare's medical reviewer knew or should have known it. Therefore, U.S. Healthcare was negligent in the care it provided to Mr. Pappas.

Both of Pennsylvania's appellate courts expressly recognized that the claims made against petitioner are common law tort claims. "Appellants do not seek benefits denied, because Mr. Pappas was transferred to a hospital capable of supplying the needed services; they do not seek to challenge the administration of the Plan, again because there is no complaint that USHC did not perform its duties." App. 31a. "Claims that an HMO was negligent when it provided contractually-guaranteed medical benefits in such a dilatory fashion that the patient was injured indisputably are intertwined with the provision of safe medical care." App. 11a. Relying on *Travelers*, the Pennsylvania Supreme Court further comments "it would be highly questionable for us to find that these claims were preempted when the United States Supreme Court has stated that there was no intent on the part of Congress to preempt state laws concerning the regulation of the provision of safe medical care." App. 11a-12a.

III.

THERE IS NO CONFLICT WITH DECISIONS OF THE THIRD CIRCUIT OR OTHER COURTS OF APPEALS.

U.S. Healthcare cites to seven decisions of the United States Courts of Appeals issued subsequent to *Travelers* and *Dillingham* for the proposition that the court below improperly ignored federal appellate holdings that ERISA preempts medical malpractice claims. Those seven decisions are freely distinguishable.

Bast v. Prudential Ins. Co. of Am., 150 F.3d 1003 (9th Cir. 1998); *Englehardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998); *Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1512 (1998); and *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1516 (1998), all involved plaintiffs' claims which came within the scope of the civil enforcement provisions set forth in § 502(a)(1)(B) of ERISA. Thus, the United States Circuit Courts all determined that those claims were completely preempted. Where a claim is completely preempted under § 502(a), it is necessarily preempted under § 514(a). *Rice v. Panchal*, 65 F.3d 637, 646, n.10 (7th Cir. 1995), citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). As discussed more completely, *infra*, the issue herein is whether the malpractice claims were preempted by § 514(a).

Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996), does not discuss or even cite to *Travelers*. And although the court did find that the plaintiff's claim

that her HMO was vicariously liable for her doctor's negligence "related to" her benefit plan and was preempted, part of the reason for that conclusion was that the plan provided a higher level of benefits if participants sought treatment from that physician, necessitating referral to the plan. *Id.* at 1493.

Likewise, *Cannon v. Group Health Serv.*, 77 F.3d 1270 (10th Cir.), *cert. denied*, 519 U.S. 816 (1996), does not mention *Travelers*. The issue in *Cannon*, however, was whether ERISA may preempt state common law claims when no alternative remedy is possible. The court stated, and the plaintiff did not dispute, that the claims at issue were claims asserting improper processing of benefits, thus preempted under ERISA. *Id.* at 1273-1274.

Similarly, *Parrino v. FHP Healthcare*, 146 F.3d 699 (9th Cir.), *cert. denied*, 119 S. Ct. 510 (1998), arose from inappropriate processing of a claim for plan benefits. The court held the claim preempted under § 514(a). In doing so, the court noted that ERISA preempts "state laws that mandate[ ] employee benefit structures or their administration." *Id.* at 705, citing *Travelers*.

Careful examination of the above decisions distinguishes them from the instant matter, where the claim is that U.S. Healthcare was negligent in arranging for and providing medical care to Mr. Pappas. Consequently, the court below did not err in suggesting that an absence of post *Travelers* and post *Dillingham* federal appellate decisions supported its ruling.

Analysis of the Third Circuit's decision in *Dukes v. U.S. Healthcare*, 57 F.3d 350 (3rd Cir.), *cert. denied*, 516

U.S. 1009 (1995), correspondingly reveals the flaw in petitioner's argument. In *Dukes* the issue, again, was whether the plaintiffs' claims came within the scope of the civil enforcement provisions set forth in § 502(a)(1)(B) of ERISA, thus permitting their removal to federal court. Because the plaintiffs were not attempting to "recover benefits due . . . under the terms of [the] plan, to enforce . . . rights under the terms of the plan, or to clarify . . . rights to future benefits under the terms of the plan", but instead attacked the quality of the benefits they received, the Third Circuit found that removal was improper. In reaching that outcome, the court began its analysis with statutory construction, as directed by *Travelers*. The court resolved that quality control of benefits "is a field traditionally occupied by state regulation and . . . interpret[ed] the silence of Congress as reflecting an intent that it remain such." *Dukes*, 57 F.3d at 357. In particular, the court concluded that its holding leaves "open for resolution by the state courts" whether negligence claims, such as those asserted herein, are preempted under § 514(a) of ERISA. *Id.*

Because it is not an issue in this case, the ruling of the Pennsylvania Supreme Court does not touch on the complete-preemption exception of those state laws which fall within the civil enforcement provision of § 502. The court correctly addressed the "relate to" language of § 514 which is at issue here, and which, pointedly, was not resolved by *Dukes*. Thus, there is no conflict between the Pennsylvania Supreme Court and the United States Court of Appeals for the Third Circuit.

IV.

YOUR COURT HAS GIVEN CLEAR DIRECTION TO THE LOWER COURTS IN THIS IMPORTANT AREA OF LAW.

In the past, lower court decisions with respect to the extent of ERISA § 514(a) preemption have varied markedly and incompatibly. Notably, nearly all inconsistencies occurred prior to the decisions handed down by your Honorable Court in *Travelers*, *DeBuono* and *Dillingham*. Importantly, however, as one author has recognized, *Travelers* "provides much needed guidance for courts asked to identify the line delimiting state laws that Congress intended to preempt . . ." K. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Pre-emption*, 13 Yale J. on Reg. 255, 290 (1996).

Travelers' influence is now emerging in decisions of other lower courts, limiting ERISA preemption of state law tort claims. These courts have applied *Travelers* and its progeny to come to a more functional definition of "relate to". *See, for example, Crum v. Health Alliance-Midwest, Inc.*, No. 98-CV-2241, 1999 U.S Lexis 6469, *9 (C.D. Ill. May 6, 1999) (noting that a claim for failure to diagnose myocardial infarction would not be preempted under § 514(a)); *Prudential Ins. Co. of America v. Doe*, No. 94-CV-1153, 1999 U.S. Lexis 5635, *34 (E.D. Mo. March 31, 1999) (determining that claims for emotional distress and invasion of privacy are not preempted); *Phommyvong v. Muniz*, No. 3:98-CV-0070-L, 1999 U.S. Lexis 3101, *10 (N.D. Tex. March 11, 1999) (concluding ERISA preemption does not apply to claims based upon quality of care received); *Moreno v. Health Partners Health Plan*, 4

F. Supp. 2d 888, 893 (D. Ariz. 1998) (finding "no relation between an action for medical malpractice and the recovery of benefits or the clarification of rights to future benefits under an ERISA plan."); *Ray v. Value Behavioral Health, Inc.*, 967 F. Supp. 417, 423 (D. Nev. 1997) (finding claims for negligence, invasion of privacy and infliction of emotional distress are "exactly the sort of generally applicable personal injury laws that § 514 of ERISA does not preempt."); *Dykema v. King*, 959 F. Supp. 736, 739 (D.S.C. 1997) (agreeing that a claim of direct liability for failure to diagnose pulmonary embolism does not "relate to" an ERISA plan); *Nascimento v. Harvard Community Health Plan*, No. 94-2543, 1997 Mass. Super. Lexis 166, *27 (Mass. Super. Sept. 26, 1997) (holding that the provisions of ERISA do not preempt a claim for failure to provide bone marrow transplantation therapy); *Nealy v. U.S. Healthcare*, 93 N.Y.2d 219-220 (1999) (noting claims for failure to take reasonable steps to provide for patient's timely treatment by specialist do not "relate to" the administration of an ERISA plan). Each of these decisions is compatible with "the general tenor of recent [Supreme] Court cases that reemphasize the strength and vitality of the presumption against ERISA pre-emption of laws of general application." R. Charrow and L. Greenlees, *ERISA Pre-Emption — A Law in Search of a Doctrine*, Health L. Dig., March 1999 at 14.

In like manner, the Pennsylvania Supreme Court, in reaching its decision, applied the direction set forth in *Travelers*, as well as other decisions of your Court. First, the court heeded the caution to "assum[e] that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless it [is] the clear and manifest purpose of Congress." App. 5a, citing *Cipollone v. Liggett Group*,

505 U.S. 504, 516 (1992). Next, the court turned to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." App. 8a, citing 514 U.S. at 656. Simply put, the statute contains no suggestion that it was intended to displace the states' traditional roles of regulating health care and countering negligent patient care. The Pennsylvania Supreme Court properly followed your Court's holdings and determined that Haverford's claim did not "relate to" the administration of an ERISA plan.

CONCLUSION

There is no reason for your Honorable Court to intervene in this matter. The decision of the Pennsylvania Supreme Court is not a final judgment. Moreover, it is consistent with your Honorable Court's holdings in *Travelers, DeBuono* and *Dillingham*. The petition should be denied.

Respectfully submitted,

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